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United States of America

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA, ) Case No. 07-CR-3415-DMS  
11 Plaintiff, ) DATE: June 6, 2008  
12 v. ) TIME: 1:30 p.m.  
13 MARTIN MORALES ) GOVERNMENT'S RESPONSE IN  
14 LOZANO-VARGAS (3), ) OPPOSITION TO DEFENDANT'S MOTIONS  
15 Defendant. ) TO:  
16 ) (1) SUPPRESS STATEMENTS  
17 ) (2) FILE DECLARATION LATE; and  
18 ) (3) FILE FURTHER MOTIONS  
19 ) TOGETHER WITH A STATEMENT  
20 ) OF FACTS AND A MEMORANDUM  
21 ) OF POINTS AND AUTHORITIES  
22 )

19 COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel,  
20 Karen P. Hewitt, United States Attorney, and Peter J. Mazza, Assistant United States Attorney, and  
21 hereby files its response to Defendant Martin Morales Lozano-Vargas's motions to suppress  
22 statements, file his declaration in support of his motion to suppress after the Court-imposed date,  
23 and and to file additional motions. Said response is based upon the files and records of this case,  
24 together with the attached statement of facts and accompanying memorandum of points and  
25 authorities.

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I

## **STATEMENT OF THE CASE**

## A. THE CHARGE

On December 19, 2007, a grand jury sitting in the Southern District of California returned a one-count Indictment against Defendants, charging them with possession of marijuana with the intent to distribute, in violation of 21 U.S.C. § 841(a)(1). On December 20, 2007, Defendant was arraigned on the Indictment.

**B. STATUS OF DISCOVERY**

On January 2, 2008, the Government produced approximately 120 pages of written discovery to all Defendants. That same day, the Government produced an additional 12 pages to Defendant Lozano-Vargas. The documents that have been produced constitute all discoverable material that the Government has to date, and includes, inter alia: (1) investigative reports; (2) Defendant's criminal history; (3) documents seized from the rental vehicle; and (4) photographs taken throughout the investigation.

II

## **STATEMENT OF FACTS**

During the day on December 8, 2007, Border Patrol agents were conducting routine surveillance duties at the Midway Campground, which is in the area of the Imperial Sand Dunes. Throughout the course of the day, Border Patrol Agent Tyler Emblem observed activity at the Midway Campground that he felt was suspicious based on his training and experience. Specifically, Agent Emblem observed several individuals camping in the area of a rental motor home that had positioned their other vehicles in a "V" shape, which effectively blocked the view into their camping area. Agent Emblem also recognized one of the off-road vehicles parked in the area of this group as one that fit the description of a sand buggy that had previously been reported by citizens as a possible drug smuggling vehicle. At approximately 11:30 a.m., Drug Enforcement

1 (BLM) Special Agent Clark established stationary surveillance of the suspicious campground. As  
2 agents conducted surveillance of the group throughout the afternoon, they noticed that several  
3 individuals entered the camp and left shortly thereafter. They further noticed several members of  
4 the group going to the outhouse for extended periods of time. Agents conducted surveillance of  
5 the Defendants' campground from close range – approximately 30 yards – throughout the day.

6 At approximately 8:10 p.m., agents observed one of the all terrain vehicles (ATVs)  
7 associated with the group depart from the campground with its headlights off. The ATV left in a  
8 southerly direction toward the United States/Mexico international boundary that is approximately  
9 one mile south of the campground. At approximately 8:20 p.m., agents observed an individual  
10 later identified as Defendant Trapero-Zazueta extinguish the campfire, while another individual  
11 later identified as Defendant Lozano-Vargas left the campground with his headlights off.

12 At approximately 8:30 p.m., Defendant Lozano-Vargas returned to the campground on an  
13 ATV with the headlights off. Shortly thereafter, agents utilizing night-vision equipment, observed  
14 several other individuals on ATVs driving from the south toward the campground without using  
15 the headlights on their vehicles. Agents observed that these ATVs also had large bundles attached  
16 to them. Based on these observations, and their individual training and experiences, agents  
17 suspected that the group to be conducting narcotics-related activities.

18 At the campground, Ranger Swanson observed the ATVs unload the bundles onto a flatbed  
19 trailer at the direction of Defendant Lozano-Vargas. After the bundles were loaded onto the  
20 flatbed trailer, the ATVs departed the campground with their headlights activated. Ranger  
21 Swanson then observed individuals later identified as Defendants Trapero-Zazueta, Lozano-  
22 Vargas, and Christian Maria Rodriguez transferring the bundles from the flatbed trailer to the area  
23 of the motor home. The flatbed trailer was hooked up to the motor home. During the transfer of  
24 the bundles, agents noticed Defendant Magana appear to be serving as a lookout for the group. He  
25 would alternate between watching over the transfer of the bundles and look out in the direction of  
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1 other campgrounds. Once the bundles were removed from the trailer, Defendant Trapero-Zazueta  
2 relit the campfire.

3 At approximately 11:50 p.m., agents approached the area of the motor home. As they  
4 neared, they made contact with Defendant Rodriguez who was seated in the driver's seat of the  
5 motor home. Defendant Rodriguez exited the motor home and informed agents that there were  
6 more individuals still inside. Agents and officers instructed all remaining individuals to exit the  
7 motor home. Only Defendants Trapero-Zazueta and Lozano-Vargas responded by exiting the  
8 motor home. Officers then called out a second time, and Defendant Magana exited. Officers  
9 called out a third time for remaining occupants to exit the motor home, and Defendant Heredia-  
10 Vargas finally emerged from the motor home. Fearing additional individuals may still be inside,  
11 officers conducted a protective sweep of the motor home.

12 Upon entering the motor home, agents encountered an overwhelming odor of a masking  
13 agent and marijuana. As agents proceeded to sweep the rear area of the motor home, they noticed  
14 in plain view, several large bundles in the shower area. Agents noticed in plain view several  
15 additional bundles stacked immediately next to the bed in the rear sleeping quarters. The bundles  
16 were approximately 2' x. 1.5' wide and approximately 10" deep. They were painted black, and  
17 wrapped in cellophane plastic and aluminum foil. Based on their training and experiences, officers  
18 and agents at the scene recognized these bundles to be consistent with those frequently used to  
19 conceal narcotics.

20 Once the agents exited the motor home, Defendant Rodriguez spontaneously stated that her  
21 mother had rented the motor home and she wanted to know "what was going on." Subsequent  
22 checks revealed the motor home was rented to Defendant Heredia-Vargas on December 7, 2007,  
23 in Indio, California. The five individuals were taken into custody.

24 A subsequent search of the vehicle revealed 47 bundles that contained approximately  
25 382.08 kilograms (842.40 pounds). Field tests revealed that the bundles contained marijuana.

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1 On December 9, 2007, at approximately 12:50 a.m., Agent Butler informed Defendant  
2 Lozano-Vargas of his Miranda rights in English from a pre-printed DEA form. Defendant Lozano-  
3 Vargas agreed to answer questions without an attorney present. He stated that the other occupants  
4 of the motor home arrived at the campground on Friday night, December 7, 2007. Defendant  
5 Lozano-Vargas admitted that he was watching for Border Patrol agents and other law enforcement,  
6 and that when he would see law enforcement, he would notify his friends. He stated that he  
7 expected to be paid approximately \$200 over the weekend. Defendant Lozano-Vargas further  
8 informed agents that he had traveled to Indio, California with Defendant Trapero-Zazueta in the  
9 black truck, but that he did not know Defendant Trapero-Zazueta well. Defendant Lozano-Vargas  
10 stated that he came to the sand dunes at the invitation of Defendant Rodriguez. He stated that he  
11 did not know the individuals who had arrived at the campground earlier in the evening on the  
12 ATVs. He further denied knowing there was marijuana in the motor home. Finally, Defendant  
13 Lozano-Vargas informed agents that he did not wish to answer any more questions without the  
14 presence of his grandmother, Defendant Vargas. Agents did not ask any more questions.

III

## **POINTS AND AUTHORITIES**

**A. DEFENDANT'S MOTIONS TO SUPPRESS SHOULD BE DENIED**

## 1. Defendant's Post-Arrest Statements Were Voluntary

19 Defendant asserts that his post-arrest statements were involuntary for a variety of reasons.  
20 A statement made in response to custodial interrogation is admissible under Miranda v. Arizona,  
21 384 U.S. 437 (1966), and 18 U.S.C. § 3501, if a preponderance of the evidence indicates that the  
22 statement was made after an advisement of rights, and was not elicited by improper coercion.  
23 Colorado v. Connelly, 479 U.S. 157, 167-70 (1986) (preponderance of evidence standard governs  
24 voluntariness and Miranda determinations; valid waiver of Miranda rights should be found in the  
25 “absence of police overreaching”; “coercive police activity is a necessary predicate to the finding  
26 that a confession is not ‘voluntary’”). Whether there has been an intelligent Miranda waiver

1 depends upon the particular facts in the case, including but not limited to the background,  
 2 experience, and conduct of the accused. Brewer v. Williams, 430 U.S. 387, 403 (1977); United  
 3 States v. Rodriguez-Gastelum, 569 F.2d 482, 483 (9th Cir.), cert. denied, 436 U.S. 919 (1978). A  
 4 statement is considered "voluntary" if the totality of the surrounding circumstances indicates it was  
 5 the product of free and rational choice. Columbe v. Connecticut, 367 U.S. 568 (1961); see also  
 6 Moran v. Burbine, 475 U.S. 412, 421 (1986) (recognizing that the waiver must be free from  
 7 intimidation, coercion, or deception). The inquiry is "whether a defendant's will was overborne"  
 8 by the circumstances surrounding the statements. Schneckloth v. Bustamonte, 412 U.S. 218, 226  
 9 (1973). The voluntariness of a Fifth Amendment waiver depends on the absence of police  
 10 overreaching, not on "free choice" in any broader sense of the word. Connelly, 479 U.S. 157. In  
 11 examining the totality of the circumstances, the court must examine the personal characteristics  
 12 of the defendant, together with the details of the interrogation. Schneckloth, 412 U.S. at 226  
 13 (stating that no one particular factor is dispositive; for example, the Government does not need to  
 14 demonstrate that police informed the suspect of his right to refuse to answer questions). Relevant  
 15 personal characteristics include a defendant's past experience with law enforcement, Lynumn v.  
 16 Illinois, 372 U.S. 528, 534 (1963), age, intelligence, educational level, knowledge of rights, and  
 17 the defendant's physical, mental, or emotional condition. Brewer, 430 U.S. at 403.

18 Here, DEA Special Agent Jeffrey Butler advised Defendant of his Miranda rights on  
 19 December 9, 2007, at approximately 12:50 a.m. Agent Butler read Defendant his rights pursuant  
 20 to a standardized Miranda warning form, DEA Form 13a. Defendant acknowledged that he  
 21 understood his rights. In response to Agent Butler's question of whether he was willing to answer  
 22 questions despite his Constitutional rights, Defendant Lozano-Vargas responded "sure." Agent  
 23 Butler then proceeded to question him. His statements were knowing, intelligent, and voluntary.  
 24 See United States v. Washington, 431 U.S. 181, 188 (1977) ("Indeed, it seems self-evident that one  
 25 who is told he is free to refuse to answer questions is in a curious posture to later complain that his  
 26 answers were compelled.") Defendant had several prior law enforcement contacts prior to the  
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1 instant offense, including three prior convictions, which indicate that Defendant had a heightened  
2 awareness of his Constitutional rights at the time of arrest. See Lynumn, 372 U.S. at 534.  
3 Furthermore, while Defendant claims that he was forced to wait outside for approximately one  
4 hour, agents did not even attempt to clear the motor home for the first time until 11:50 p.m. and  
5 did not conduct their first interview until 12:15 a.m. Nor is there any indication that Defendant  
6 was under the influence of alcohol or narcotics. See United States v. Ritter, 456 F.2d 178, 179  
7 (10th Cir. 1972) (holding that defendant's emotional instability, psychiatric treatment, fear of  
8 police, and claims of being cold and hungry did not make his Miranda waiver involuntary).  
9 Finally, even accepting Defendant's claims that agents implied that his grandmother would be held  
10 responsible for the crime – which the Government does not concede – such actions would not be  
11 of the variety that would cause Defendant's will to be "overborne by the circumstances  
12 surrounding" his statement. Dickerson v. United States, 530 U.S. 428, 434 (2000); Frazier v.  
13 Cupp, 394 U.S. 731 (1974) (holding that even where police falsely told a defendant that a  
14 coconspirator had confessed, the defendant's statement was not involuntary). Such a statement,  
15 if made, would have been an entirely correct statement of the situation, nor would it have been  
16 improperly coercive. See United States v. Boyce, 594 F.2d 1246 (9th Cir. 1979) (holding that  
17 police officer's appeals to defendant's loyalty to his family did not render the defendant's  
18 confession involuntary); United States v. Johnson, 351 F.3d 254 (6th Cir. 2003) (holding that threat  
19 to arrest a third party does not render a confession involuntary where there is probable cause to  
20 arrest that third party). Even so, to the extent the Court would find such statements inappropriate,  
21 such "conduct is only relevant to the constitutional validity of a waiver if it deprives a defendant  
22 of knowledge essential to his ability to understand the nature of his rights and the consequences  
23 of abandoning them." Moran, 475 U.S. at 424 (holding that police did not violate defendant's  
24 Miranda rights where they purposely did not inform him of his attorney's attempt to contact him).  
25 Defendant was entirely free from coercion, duress, or trickery in deciding to speak with Agent  
26 Butler after learning his Miranda rights. Indeed, all questioning ceased once Defendant Lozano-  
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1 Vargas informed Agent Butler that he did not wish to answer any more questions outside the  
2 presence of his grandmother. Accordingly, the Court should deny his motion to suppress his  
3 statements.

**B. MOTION TO FILE DEFENDANT'S DECLARATION LATE**

5 The United States does not oppose the Court granting Defendant's motion to accept his  
6 declaration after the Court-imposed deadline.

**C. LEAVE TO FILE ADDITIONAL MOTIONS**

8 The United States does not oppose Defendant's request for leave to file further motions as  
9 long as the order grants reciprocal leave to file additional motions and that any new motions are  
10 based on newly discovered information.

IV

## **CONCLUSION**

13 For the foregoing reasons, the Government requests that Defendant's motions be denied  
14 where indicated.

**15** DATED: May 29, 2008.

Respectfully submitted,

KAREN P. HEWITT  
United States Attorney

s/ Peter J. Mazza  
**PETER J. MAZZA**  
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ) Case No. 07-CR-3415-DMS  
Plaintiff, )  
v. )  
MARTIN MORALES ) CERTIFICATE OF SERVICE  
LOZANO-VARGAS (3), )  
Defendant. )

**IT IS HEREBY CERTIFIED THAT:**

I, PETER J. MAZZA, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of a Response to Defendants' Motion for Discovery, Leave to File Additional Motions, and Suppression Motions By Defendant Trapero-Zazueta on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

## 1. Norma Aguilar, Esq.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 29, 2008.

s/ Peter J. Mazza  
PETER J. MAZZA